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IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

No. 137.

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JAMES H. McKENNEY
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JACOB NEWMAN and SALMON O. LEVINSON,
Surviving Partners of the firm of NEWMAN,
NORTHRUP and LEVINSON,
Plaintiffs in Error.

vs.

HARRY B. GATES, Defendant in Error.

MOTION TO DISMISS OR AFFIRM.

Notice and Brief of Argument Upon the Motions

ALBERT BAKER,
EDWARD DANIELS,
LEWIS C. WALKER,
EDWARD E. GATES,
Counsel for Defendant in Error for
the Purpose of the Motions.

THE WOOD-CARNAHAN CO., INDPLS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906

No. 137

Jacob Newman and Salmon O. Levinson,
Surviving Partners of the firm of Newman, Northrup and Levinson, Plaintiffs in Error,

vs.

Harry B. Gates, Defendant in Error.

Comes now, Harry B. Gates, defendant in error herein, by Albert Baker, Edward Daniels, Lewis C. Walker and Edward E. Gates, his Counsel, appearing in that behalf and moves the Court to dismiss the Writ of Error in the above entitled cause for want of jurisdiction because the judgment or decree from which the said Writ of Error purports to have been taken is the judgment or decree of the Supreme Court of one of the United States, to wit, the Supreme Court of the State of Indiana.

And the said defendant in error, Harry B. Gates, by Counsel as aforesaid, also moves the Court to affirm the said judgment or decree from which the said Writ of Error purports to have been taken, because, although the

record in the said cause may show that this Court has jurisdiction in the premises, yet it is manifest that the said Writ of Error was taken for delay only.

ALBERT BAKER,
EDWARD DANIELS,
LEWIS C. WALKER,
EDWARD E. GATES,

Counsel for the said defendant in error,
Harry B. Gates, for the purposes of
these motions.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906

No. 137

Jacob Newman and Salmon O. Levinson, Surviving Partners of the firm of Newman, Northrup and Levinson, Plaintiffs in Error,

vs.

Harry B. Gates, Defendant in Error.

To Messrs. Charles Martindale and S. S. Gregory, Counsel for Plaintiffs in Error.

Please take notice that on the 3d day of December, 1906, at the opening of the Court, or as soon thereafter as Counsel can be heard, the motions, of which the foregoing are copies, will be submitted to the Supreme Court of the United States, for the decision of the Court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with the said motions in support thereof.

ALBERT BAKER.
EDWARD DANIELS.
LEWIS C. WALKER.
EDWARD E. GATES.

Counsel for the said defendant in error, Harry B. Gates, for the purposes of the motions.

Service of the above notice and receipt of the brief of argument of the Defendant in Error in support of the motions, are hereby acknowledged this 9th day of November, A. D. 1906.

CHARLES MARTINDALE,
Attorney for Plaintiffs in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906

No. 137

Jacob Newman and Salmon O. Levinson,
Surviving Partners of the firm of Newman, Northrup and Levinson, Plaintiffs in Error,

vs.

Harry B. Gates, Defendant in Error.

BRIEF OF ARGUMENT IN BEHALF OF THE DEFENDANT IN ERROR, HARRY B. GATES, UPON MOTIONS TO DISMISS OR AFFIRM.

In order that the grounds of the motions to dismiss or affirm in this case may be intelligently presented, it becomes necessary to make a brief reference to the facts shown in the Transcript of the Record.

STATEMENT OF FACTS.

The Writ of Error was taken by the plaintiffs in error, from a judgment or decree rendered by the Supreme Court of the State of Indiana on December 7, 1904, which was

ordered spread of record on June 21, 1905. (Printed Transcript, pages 328-331.)

The original suit was filed on the 22d day of December, 1893, in the Marion Superior Court of the State of Indiana. (Transcript, page 4.) This was a suit upon a judgment alleged to have been rendered by the Circuit Court of Cook County in the State of Illinois, on the 19th day of June, 1893. The amount of the judgment sued upon was One Thousand Three Hundred (1,300.00) Dollars. The original plaintiffs were Jacob Newman, George W. Northrup, Jr., and Salmon O. Levinson. (Transcript, page 5.)

The defendant in error, Harry B. Gates, filed his answer (Transcript, pages 6-12), the third paragraph of which was a counter-claim against said plaintiffs; this counter-claim was held upon demurrer to state a cause of action against the original plaintiffs. (Transcript, page 13.) Issues were joined. Trial was had to a jury, resulting in a verdict for the original plaintiffs in error in the sum of $1,410.98. (Transcript, page 29.)

Defendant in error appealed to the Appellate Court of Indiana, which Court reversed the case and the case was remanded to the Marion Superior Court for a new trial. (Transcript, page 34, and see also opinion of the Supreme Court of Indiana, Transcript, page 329.)

Before the second trial of the case was had the defendant withdrew his first paragraph of answer, a general denial (Transcript, page 34), and the defendant upon the trial expressly admitted the rendition and validity of the

judgment sued upon. (Transcript, page 63.) Trial resulted in a verdict for the defendant in error, in excess of plaintiff's judgment, for $184.74. (Transcript, page 57.) After the rendition of said judgment, and before the Appeal was taken, one of the original plaintiffs, to wit, Geo. W. Northrup, Jr., died (Transcript, page 58), and the plaintiffs in error, Jacob Newman and Salmon O. Levinson, as surviving partners of the firm of Newman, Northrup and Levinson, attempted to take an appeal, in vacation, to the Appellate Court (Transcript, page 59; see also opinion of the Supreme Court of Indiana, Transcript, page 329), and failed to make the personal representative of the deceased partner a party to the appeal.

The Appellate Court reversed the case with instructions to sustain the motion for a new trial. (Transcript, page 324.) Appellee duly petitioned to remove the case to the Supreme Court of Indiana for decision, which petition was granted. (Transcript, page 328.)

Subsequently, on the 7th day of December, 1904, the Supreme Court of Indiana dismissed the appeal:

> "On account of the failure to make the personal representative of George W. Northrup a co-appellant the Court has no jurisdiction to determine the case upon its merits." (Transcript, page 331.)

and judgment was rendered accordingly. Appellants filed a petition for re-hearing (Transcript, page 331), and in this petition, for the first time, raised the precise Constitutional question upon which they rely in the Supreme Court of the United States and this, notwithstanding the

fact that appellee raised the same question of practice in the Appellate Court before the case reached the Supreme Court of Indiana and, in fact, based the motion to remove the case to the Supreme Court of Indiana from the Appellate Court upon that ground. (Printed addition to the Record, page 2, reason numbered I.) The petition for rehearing was overruled by the Supreme Court of Indiana on June 21, 1905, without comment or reference to such constitutional questions referred to in such petition for rehearing. (Transcript, page 331.) The petition for rehearing filed by the appellants will be found on page 4 of the printed addition to the record.

Inasmuch as the opinion of the Supreme Court of the State of Indiana is sought to be reviewed by the Writ of Error, it is deemed advisable to set the opinion out in full at this point, and it is as follows (Transcript, page 328):

> "This action was brought by appellants and George W. Northrup, Jr., on a judgment recovered by them against appellee in the circuit court of Cook County, Illinois, for services as attorney for appellee, performed by them as partners.
>
> Appellee filed a counter-claim alleging certain breaches of duty arising from the relation of attorney and client in connection with the employment of said firm as his attorneys, for which services said Illinois judgment was rendered. The breaches of duty alleged in the counter-claim by appellee were acts of commission and omission by the plaintiffs below as the attorneys for appellee by reason of which he suffered great pecuniary

loss, on account of which he demanded judgment for $2,500.

Said cause was tried and final judgment rendered which was reversed by the Appellate Court. (Gates v. Newman, 18 Ind. App. 392; Newman v. Gates, 150 Ind. 59, 61.) It was held by the Appellate Court on the former appeal that the counter-claim "is based upon a breach of contract." After said cause was returned to the Court below a second trial resulted in a verdict and judgment in favor of Appellee against said three defendants to said counter-claim, in the sum of $184.74 and costs. Before the appeal was taken from said judgment, George W. Northrup, Jr., one of the plaintiffs below and one of the persons against whom said judgment was rendered, died.

Appellee insists that this court has no jurisdiction of this appeal for the reason that the personal representative of George W. Northrup, Jr., deceased, a co-party to said judgment, has not been made an appellant.

This is a vacation appeal and it is well settled that all the parties against whom the judgment was rendered must be made co-appellant on appeal or the appeal will be dismissed for want of jurisdiction. (Rich Grove Township et al. v. Emmet (this term) and cases cited.)

Section 648, Burns 1901 (636 R. S. 1881 and Horner 1901), provides that: "In case of the death of any or all the parties to a judgment before an appeal is taken, an appeal may be taken by, and notice of appeal served upon, the persons in whose favor and against whom the action might

have been revived, if death had occurred before judgment."

Section 272, Burns 1901 (271 R. S. 1881 and Horner 1901), provides that "No action shall abate by the death or disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or disability of a party, the court, on motion or supplemental complaint, at any time within one year, or on supplemental complaint afterward, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action."

It is clear under our Statutes concerning the causes of action that survive, secs. 283, 284, 285, Burns 1901 (282, 283, 284 Horner 1901), that causes of action for breaches of duty by Attorneys to their clients by which the property rights and interests of the clients are affected injuriously, survive the death of either party. Weeks on Attorneys at Law, p. 625; Allen v. Clark, Exr., 11 Weekly Reporter 304, 7 L. T. N. S. 781; Knight v. Quarrels, 4 Moore 532, 2 Brod. & B. 102; Feary v. Hamilton, 140 Ind. 45, 51-53, and cases cited; Boor v. Lowry, 103 Ind. 468 and cases cited; 53 Am. Rep. 519, and note pp. 525-539; Hess v. Lowry, 122 Ind. 225, and cases cited; 33 Albany L. J. pp. 184-187, 204-208, and cases cited.

It is true that after the death of a member of a partnership the surviving partner or partners are

vested with the exclusive right of possession and management of the partnership property, including the exclusive right to collect the debts due the partnership by suit or otherwise. (Parsons on Partnerships, secs. 342, 344, 345; McIntosh v. Zaring, 150 Ind. 301, 312, and cases cited; Valentine v. Wysor, 123 Ind. 47, 52.

In this State a firm creditor is not required to exhaust his remedy against the surviving partners or show that they are insolvent before he can resort to the estate of the deceased partner. He may proceed at once on the death of a partner against the estate of the deceased partner as well as against the surviving partners. (Ralston v. Moore, 105 Ind. 245; see Camp v. Grant, 21 Conn. 41, 55-56.) If suit was not commenced on said claim against the members of the partnership before the death of the partner, the statute requires that the proceeding against the estate be by claim filed against said estate under Sec. 2463, Burns' 1901. In other words, while rights of action for liabilities due a partnership survive and vest exclusively in the surviving members of the firm, the liabilities of the partnership on the death of a partner, survive not only against the surviving partners but also against the estate of the deceased partner.

In this case, Northrup died after the rendition of the judgment on the counter-claim against him and his co-defendants to the counter-claim, Newman and Levinson. Such a judgment binds the partnership property and the individual property of each judgment defendant, and may in the absence of a statute to the contrary, be enforced by execution against the separate property of each of

said judgment defendants before having recourse to the partnership property. (Story on Partnership, Sec. 260.)

Said Northrup having died after the counter-claim was filed, the case stands, so far as the question under consideration is concerned, in all respects the same as if said counter-claim was an independent action against the defendants thereto, and judgment had been rendered in favor of appellee for said sum of $184.74. If an independent action had been commenced against the members of said firm for the cause of action set up in said counter-claim, in the Court below, and thereafter and before judgment, said Northrup had died, then his administrator or executor could have been made a party defendant in said action and the same prosecuted to final judgment, under the provisions of Sec. 272 (271), *supra.*

As said cause of action could have been revived against the personal representative of said Northrup under Sec. 272 (271), *supra,* it follows, under the provisions of Sec. 648, *supra,* that such personal representative was a necessary party appellant to the appeal and should have been made a co-appellant and served with notice. (Richgrove Tp. v. Emmett (this term), and cases cited.)

The prohibition of Sec. 2465, Burns 1901, against bringing actions against an executor or administrator by complaint and summons, and requiring all claims against the estate to be filed in the clerk's office, does not apply to such a case. It relates to the bringing of actions, and not to those brought before the death of the deceased, while Sec. 272 (271), *supra*, has reference to actions al-

ready commenced and forbids their abatement by the death of any or all the parties if the cause of action survives, and provides for the prosecution of the action by or against the personal representative of the deceased party. (Holland v. Holland, 131 Ind. 196, 200, 201; Clodfelter v. Hulett, 92 Ind. 426, 434; Lawson v. Newcomb, 12 Ind. 439; Burnett v. Milnes, 148 Ind. 230, 235; I Woollen's Trial Procedure, Secs. 555-561.)

On account of the failure to make the personal representative of Geo. W. Northrup, Jr., a co-appellant, the Court has no jurisdiction to determine the case upon its merits. The appeal must, therefore, be dismissed. (Richgrove Township v. Emmett (this term), and cases cited.

Appeal dismissed.

It is therefore considered by the Court that the appeal from the judgment of the Court below in the above entitled cause, be dismissed, at the cost of the appellants, all of which is ordered to be certified to said Court.

And it is further considered and adjudged by the Court that the appellee recover of the appellants the sum of $....., for his costs and charges in this behalf expended."

The assignment of alleged errors for consideration by the Supreme Court of the United States will be found in the Transcript, pp. 332-33, and is:

The Supreme Court of Indiana erred in holding and deciding:

"1. That the counter-claim set up by Appellee Gates, the defendant, in the trial court, based upon a breach of the same contract of hiring, which was the basis of the action of the appellants against Appellee Gates, in the Circuit Court of Cook County, Illinois, was not adjudicated by the judgment in the Circuit Court of Cook County, Illinois, and by so deciding denied to the judgment of the Circuit Court of Cook County, Illinois, the force and effect which it has between the parties in the State of Illinois, wherein it was rendered, and denies full faith and credit to said judgment contrary to and in violation of Article 4, Section 1, of the Constitution of the United States.

2. That the appellee's counter-claim being valid and not merged and adjudicated by the judgment of the Circuit Court of Cook County, Illinois, it was of a nature which survived against the personal representatives of a member of the partnership of Newman, Northrup & Levinson, and that the personal representatives of the deceased partner were necessary parties to the appeal, and not having been made parties that neither the Appellate Court of the State of Indiana nor the Supreme Court of the State of Indiana had jurisdiction to determine the appeal and the same must be dismissed, and judgment of dismissal was so rendered. Which final judgment of the Supreme Court necessarily involved the adjudication of the claim of the appellants to the protection of Article 4, Section 1, of the Constitution of the United States, that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State," which adjudication was adverse

to appellants' claim under said provision of the Constitution of the United States.

"For which errors the appellants, Jacob Newman and Salmon O. Levinson, surviving partners of the firm of Newman, Northrup & Levinson, pray that the judgment of the said Supreme Court of Indiana, dated June 21, 1905, be reversed and a judgment entered for the appellants aforesaid and for costs."

POINTS AND AUTHORITIES.

The Supreme Court of the United States is without jurisdiction of the subject-matter of this proceeding upon Writ of Error for the following reasons:

FIRST.

The question determined by the Supreme Court of the State of Indiana was one of practice. That Court held that it had no jurisdiction to determine the case upon its merits because of the failure to make the personal representative of George W. Northrup, Jr., deceased (in accordance with the law of the State of Indiana, provided in certain statutes set forth in the opinion), a co-appellant. The Supreme Court of the State of Indiana as it appears from the opinion itself, limited its decision to the construction and interpretation of the statutes of the State of Indiana and no Federal question was raised or discussed in the opinion. Under these circumstances the Supreme Court of the United States is without jurisdiction and the cause should be dismissed.

Questions of practice and proceeding in State Courts are for the exclusive determination of the Tribunals of the State where they may arise.

Tripp v. Santa Rosa, etc., Co., 144 U. S. 130;
Mills v. St. Clair County, 8 How. 569, 586.

Where the opinion of the State Court is confined to the construction or interpretation of a State Statute and there is no contention that such statute conflicts with any right, privilege or immunity preserved by the Federal Constitution the opinion of the State Supreme Court is final and the Supreme Court of the United States has no jurisdiction to revise such opinion whether it be erroneous or not.

McBride v. Hoey, II Pet. 167;
Nesmith v. Sheldon, 7 How. 812;
Grand Gulf, etc., Co. v. Marshall, 12 How. 165.

SECOND.

No matter what meritorious questions were involved and raised in the assignment of errors in the State Appellate Court and even though a Constitutional question were involved and erroneously decided in the trial court—if the case be not properly appealed to such StateAppellate Court, those questions can not be considered upon the appeal. The Supreme Court of Indiana can not determine a question which has not been duly and properly brought before it. Nor is it for this Court to determine whether the Supreme Court of Indiana erred or not in

deciding that the appeal was not properly taken. Counsel for plaintiffs in error must concede this. Otherwise they find themselves in the anomalous position of insisting that the Supreme Court of the United States may perfect the imperfect appeals which come before the various State Courts because somewhere in the trial of the cause, before the trial Court a question was raised involving some provision of the Federal Constitution.

Indeed, it appears from the writ of error filed in this Court that the theory of the Counsel for plaintiffs in error is somewhat of such a nature. They contend that by reason of the dismissal of the appeal by the Supreme Court of Indiana, because of the failure of the present plaintiffs in error to join the proper parties in the appeal as required by the Statutes of the State of Indiana, that Court necessarily denied full faith and credit to the judgment rendered by the Circuit Court of Cook County in the State of Illinois, in that by such dismissal, that Court recognized and necessarily held that the counter-claim of the appellee was valid and that it was not necessarily involved and adjudicated by the judgment of the Circuit Court of Cook County, Illinois, and that hence this Court has jurisdiction to consider the case upon the merits.

In this, as we see it, Counsel labor under a misapprehension. The Supreme Court of Indiana did not necessarily, nor, in fact, hold by its judgment of dismissal, that the counter-claim of appellee was valid, and that the issue presented by the counter-claim was not necessarily involved and adjudicated by the Illinois Court. In fact, the

Indiana Supreme Court held that it did not have jurisdiction of the appeal because, *technically*, the Indiana Statutes regulating appeals had not been complied with, and because *substantially* any decision it might make, if in favor of the appellee, would be ineffective inasmuch as it would not be conclusive upon the representative of the deceased judgment debtor who was not before the Supreme Court of Indiana. Logically, the decision of the Indiana Supreme Court can not be carried farther; it stopped short of the merits of the case, neither approving nor disapproving the action of the trial Court, because the merits of the case were not brought before the Indiana Supreme Court in such a way as that it could render a judgment that would have been at once complete and final.

This Court has refused in cases in which questions of a similar nature have arisen to review the decision of the State Tribunal.

Tripp v. Santa Rosa St. R. R. Co., 144 U. S. 130;

Chappell Chemical, etc., Co. v. Sulphur Mines Co., 172 U. S. 473.

THIRD.

Closely allied to these decisions is another line of authorities which is an answer to any such contention upon the part of Counsel for plaintiffs in error and which effectually disposes of the case.

In this case the Supreme Court of Indiana in its decision proceeded upon the general principles of the juris-

prudence of the State and all the matters in the issue decided were questions of general law, without reference to any Federal question. This being so, the Supreme Court of the United States has no jurisdiction to review the decision of the Supreme Court of Indiana even upon the suggestion made that if the State Court erred, it thereby deprived the plaintiffs in error of some safeguard insured by the Federal Constitution.

Servier v. Haskell, 14 Wall. 15;
Palmer v. Marston, 14 Wall. 10-12;
Hoyt v. Sheldon, 1 Black. 521.

FOURTH.

The question of whether full faith and credit is given the judgments of one State by another State does not arise in this case. Even conceding, for the argument, that the dismissal of the appeal by the Supreme Court of the State of Indiana necessarily recognized and determined that the matters pleaded in the counter-claim of the defendant in error were valid and were not adjudicated by the judgment of the Illinois Court, it is not a denial of full faith and credit of such judgment for the Supreme Court of Indiana to hold that such judgment of the trial Court of the State of Illinois is or is not an estoppel as to certain matters set up by way of counter-claim to such judgment when sued upon in Indiana. What questions are *res judicata* under a judgment rendered in the Courts of Illinois are questions of fact in the State of Indiana. A suit *in assumpsit* in Illinois at

issue under the laws of Illinois by the plea of *non assumpsit* is tried by and under the laws of Illinois and the decisions of the Supreme Court of that State, and evidence must be introduced in the State of Indiana to establish as matter of fact, what those laws and decisions are.

It is obvious, then, that all that the Supreme Court of Indiana necessarily assumed with respect to this appeal as it was presented to that Court, for the purpose of determining its own appellate jurisdiction, was:

1. A judgment was rendered by the Circuit Court of Cook County, Illinois, against the defendant in error, in favor of the plaintiffs in error *and Geo. W. Northrup, Jr.*

2. That in Indiana when suit was brought upon such judgment a counter-claim was filed by the defendant in error, setting up certain matters of fact which raised the issue of ultimate fact whether the statutory and common law of the State of Illinois permitted the defendant in error thus to counter-claim against a valid judgment rendered by a court of said State of Illinois. And that at the trial of such counter-claim upon the facts pleaded therein judgment was rendered in favor of the defendant in error, over and beyond the judgment sued upon, against the plaintiffs in error *and Geo. W. Northrup, Jr.*

3. That Geo. W. Northrup, Jr., one of the parties against whom said judgment was rendered, died after such judgment was rendered.

4. That his representative was not made a party to the appeal as it appeared upon the record and

as required by the Statutes and Laws of the State of Indiana.

Whereupon the Supreme Court of the State of Indiana dismissed the appeal.

By so doing the Supreme Court of Indiana in no way questioned the judgment of the Illinois Court and full faith and credit was not denied it.

Lloyd v. Matthews, 155 U. S. 222, 226;
Glenn v. Garth, 147 U. S. 360, 368;
Finney v. Guy, 189 U. S. 335, 339.

In Finney v. Guy, 189 U. S., *supra*, at page 341, the Court say:

> "If the case had been on trial upon issues of fact, among them being one as to what the law of Minnesota was, and the Statutes as well as the decisions above mentioned had been proved and a witness learned in the law of Minnesota had testified what such law was, as deduced by him from those Statutes and decisions, his testimony would not, even though uncontradicted, conclude the Court upon that issue. * * * * * In other words, Statutes and decisions having been proved or otherwise properly brought to the attention of the court, it may itself deduce from them an opinion as to what the law of the foreign jurisdiction is without being conclusively bound by the testimony of a witness who gives his opinion as to the law, which he deduces from those very Statutes and decisions. * * * * *

At page 343 the opinion continues.

> "This right and duty of the Courts to themselves construe the Statutes and decisions are not altered because the law of the foreign State and the various decisions of its courts are alleged to be as set forth in a pleading which is demurred to instead of being proved on a trial."

The effect of the conclusion reached by the Supreme Court of the United States in Finney v. Guy, *supra*, was that the decision of the Supreme Court of the State of Wisconsin holding that notwithstanding a judgment rendered in the State of Minnesota, coupled with the allegation that under the law of Minnesota the defendant in error was bound by such decision, that the defendant in error was not precluded by such judgment of Minnesota, was not a denial of full faith and credit to such judgment.

In Glenn v. Garth, supra, at page 368, the court say:

> "If we were to assume jurisdiction of this case, it is evident that the question submitted would be, not whether the decision of the New York Court was against a right specially set up and claimed under the Constitution of the United States, *or necessarily arising*, but whether in that decision error intervened in the construction of the Statutes of Virginia. If every time the Courts of a State put a construction upon the Statutes of another State, this Court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded

that the construction was incorrect, it would follow that the State Courts had refused to give full faith and credit to the Statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated." (See also the cases referred to in the opinion.)

Baltimore, etc., Railroad v. Hopkins, 130 U. S. 210;

Grand Gulf, etc., Co. v. Marshall, 12 How. 165-168.

Continuing, at page 369, the Court say:

"* * * Nor can the contention of Counsel, that the Virginia Statutes should be construed according to their views, be treated as the equivalent of the express assertion of a right arising under the Constitution or laws of the United States."

In Lloyd v. Matthews, *supra*, at page 226, Mr. Chief Justice Fuller, in delivering the opinion of the Court, said:

"The Federal question upon which plaintiff relies to sustain our jurisdiction is that under the Statutory law of Ohio, set out in his pleading, the transfer of the stock in question was void, and that the Court of Appeals in Kentucky in rendering judgment did not give that full faith and credit to the public acts, records, and judicial proceedings of the State of Ohio which the Constitution and the law of the United States require. (Const., Art. IV, Sec. 1; Rev. Stat., Sec. 905.) The first error

assigned is as follows: 'The Court of Appeals of Kentucky erred in the decision rendered in this case below, in failing to give full faith and credit to the laws of the State of Ohio which were presented in the pleadings; in failing to give full faith and credit to the judicial construction of such laws by the highest Court of said State; and in failing to give full faith and credit to the judicial proceedings of the Probate Court of Hamilton County, Ohio, as set forth in the pleadings'." * * *

"Now, in arriving at these conclusions, the Court of Appeals did not concur with the views of Harper's assignee, but does it therefore follow that full faith and credit was denied to the laws of Ohio and to the construction of such laws by the highest court of that State? The Courts of the United States when exercising their original jurisdiction take notice, without proof, of the laws of the several States, but in the Supreme Court of the United States, when acting under its Appellate jurisdiction, whatever was matter of fact in the State Court whose judgment or decree is under review is matter of fact there. And whenever a court of one State is required to ascertain what effect a public act of another State has in that State, the law of such other State must be proved as a fact." * * *

"The Court of Appeals was left, therefore, to construe the parts of the Ohio laws that were pleaded as it would local laws; and it is settled that, under such circumstances, where the validity of a State law is not drawn in question, but merely its construction, no Federal question arises."

FIFTH.

Thus far we have argued that no Federal question arises on this record for the Supreme Court of the United States to consider and therefore this court has no right to entertain the Writ of Error. There is yet another reason why this Court should dismiss this proceeding. The precise question upon which plaintiffs in error rely in this Court was raised for the first time in their petition for re-hearing, filed in the Supreme Court of the State of Indiana, which petition was overruled without comment or reference by the Supreme Court of Indiana to such Constitutional questions referred to in such petition for re-hearing. Upon the general proposition that a Federal question is raised too late when suggested for the first time in a petition for re-hearing after judgment in the highest court of a State where such petition is denied without opinion, we make reference to the following decisions:

Bushnell v. Crook, etc., Co., 148 U. S. 690;
Pim v. St. Louis, 165 U. S. 273;
Capital N. Bank v. First N. Bank, 172 U. S. 425;
Turner v. Richardson, 180 U. S. 87;
Johnson v. N. Y. Life Ins. Co., 187 U. S. 491;
Weber v. Rogers, 188 U. S. 10;
Mutual L. Ins. Co. v. McGrew, 188 U. S. 291;
Scudder v. Coler, 175 U. S. 33.

The question of full faith and credit to the judicial records of another State by reference to the Article of the

Constitution was raised by the objection to the introduction of the record of the proceedings of the Cook County Circuit Court upon that ground, in the trial Court, and discussed in the Appellate Court as well as the Supreme Court of the State of Indiana. But the precise question now raised, namely, that the dismissal of the appeal necessarily recognized and determined that the matters presented in the counter-claim of the defendant in error were valid and were not adjudicated by the judgment of the Illinois Court, "and by so deciding denied to the judgment of the Circuit Court of Cook County, Illinois, the force and effect which it has between parties in the State of Illinois, where it was rendered, and denies full faith and credit to said judgment contrary to and in violation of Article 4, Section 1, of the Constitution of the United States, etc., etc.," was not raised or even suggested at any time in the entire proceedings until plaintiffs in error filed their petition for rehearing, and this notwithstanding the fact that defendant in error insisted upon such dismissal in the Appellate Court, as well as when the case reached the Supreme Court of the State of Indiana and based his motion to remove the case to the Supreme Court of Indiana from the Appellate Court upon the ground that the Appellate Court decided erroneously that the appeal should not be dismissed.

Even though the precise provision of the Constitution may have been properly presented as involved in one stage of the case, yet if it is sought to sustain another contention upon another theory of the law involving the same

provision of the Constitution, the Supreme Court of the United States has held in a recent case that such latter contention is raised too late when referred to for the first time in the petition for rehearing.

Cox v. State of Texas, 202 U. S. 446.

For the foregoing reasons it is submitted that the motion to dismiss or affirm made by the defendant in error should be sustained.

Respectfully submitted,

ALBERT BAKER,
EDWARD DANIELS,
LEWIS C. WALKER,
EDWARD E. GATES,
Counsel for the said defendant in error,
for the purposes of the motions.